No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR PROJECT 21 AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Counsel for the Amicus Curiae

QUESTION PRESENTED

Whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

RULE 29.6 STATEMENT

Amicus curiae Project 21 is an initiative of The National Center for Public Policy Research, which has no parent company. No publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Equal Vote Weight Furthers the Principles and Purposes of One-Person, One-Vote 3

II. Equal Vote Weight Should Prevail Here for the Same Reasons It Has Under Section 2 8

A. Voting Rights Act Section 2 Embodies and Applies the Same Vote-Dilution Concerns Identified in *Reynolds* 9

B. Courts in Section 2 Vote-Dilution Cases Have Unanimously Rejected Arguments To Use Population Weight Instead of Vote Weight 11

C. The Same Reasoning Even More Strongly Supports Use of the Equal Vote Weight Criterion in One-Person, One-Vote Cases 14

D. Inconsistent Standards Under Section 2 and the Equal Protection Clause Present the Opportunity for Race-Based Gerrymandering and Vote Dilution 16

III. The Use of Raw Population in Apportionment Dilutes Black Votes and Black Voting Power 19

A. The Use of Total Population in Apportionment Dilutes Black Votes 21

B. The Use of Total Population in Apportionment Dilutes Black Communities' Voting Power 24

CONCLUSION 33

TABLE OF AUTHORITIES

Page

Cases

Allen v. State Board of Elections, 393 U.S. 544 (1969) 6, 7

Baker v. Car, 369 U.S. 186 (1962) 15

Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998) 12, 14, 15, 24–25, 29, 32

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998) 25

Barnett v. City of Chicago, 969 F. Supp. 1359 (N.D. Ill. 1997) 25

Bartlett v. Strickland, 556 U.S. 1 (2009) 1, 13, 17

Bush v. Vera, 517 U.S. 952 (1996) 18, 29

Campos v. City of Houston, 114 F.3d 544 (5th Cir. 1977) 11–12, 15

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2002) 20

Fairley v. Patterson, 393 U.S. 544 (1969) 8

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 4

Gray v. Sanders, 372 U.S. 368 (1963) 6, 10

Hadley v. Junior College District, 397 U.S. 50 (1970) 4

Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419 (1991) 9

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 13, 17

League of United Latin American Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) 9, 15

Miller v. Johnson, 515 U.S. 900 (1995) 18–19, 32–33

Negron v. City of Miami Be ch, 113 F.3d 1563 (11th Cir. 1997) 11

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) 9

Nixon v. Herndon, 273 U.S. 536 (1927) 4–5

Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009) 1

Perez v. Pasadena Independent School District, 165 F.3d 368 (5th Cir. 1999) 12, 13

Perkins v. Matthews, 400 U.S. 379 (1971) 8, 11

Reyes v. City of Farmers Branch, Texas, 586 F.3d 1019 (5th Cir. 2009) 12

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) 12

Shaw v. Reno, 509 U.S. 630 (1993) 7, 33

Shelby County v. Holder, 133 S. Ct. 2612 (2013) 1

Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) 6

Thompson v. Glades Cny. Bd. of Cnty. Comm'rs, 493 F.3d 1253 (11th Cir. 2007) 13

Thornburg v. Gingles, 478 U.S. 30 (1986) 8, 10, 11, 29

Townsend v. Holman Consulting Corp., 914 F.2d 1136 (9th Cir. 1990) 12

Veasey v. Abbott, No. 14-41127 (5th Cir. filed Aug. 5, 2015) 29

Voinovich v. Quilter, 507 U.S. 146 (1993) 10, 11

Wesberry v. Sanders, 376 U.S. 1 (1964) 5, 16

Whitcomb v. Chavis, 403 U.S. 124 (1971) 4

Williams v. City of Dallas, 734 F. Supp. 1317 (N.D. Tex. 1990) 29

Statutory Provisions

Voting Rights Act, § 2 .....*passim*

Voting Rights Act, § 5 8

Other Authorities

Jesse Choper, Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, 83 Mich. L. Rev. 1 (1984) 7

City of Dallas, City Council 28

City of Dallas Redistricting Commission, 2011 Adopted Districting Plan 26

Richard Engstrom, Corrected Rebuttal Report, *Perez v. State of Texas*, 5:11-cv-00360-OLG-JES-XR, ECF No. 307-1 (W.D. Tex. filed Sept. 13, 2011) 30

Michael Li, Two Texas Cases Test the Boundaries of Redistricting Law, Brennan Center for Justice (Feb. 17, 2015) 29

Peyton McCrary, Bringing Equality to Power, 5 U. Pa. J. Const. L. 665 (2003) 7

United States Census Bureau, American Community Survey, 5-Year Data Profiles 21

United States Census Bureau, Redistricting Data, Voting Age Population by Citizenship and Race (CVAP) 22

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Project 21, the National Leadership Network of Black Conservatives, is an initiative of the National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil-rights establishment. The National Center for Public Policy Research is a communications and research foundation supportive of the view that the principles of a free market, individual liberty, and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century.

Project 21 participated as *amicus curiae* in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), and *Bartlett v. Strickland*, 556 U.S. 1 (2009), among other cases. The instant case concerns Project 21 because it raises vital questions about the nature and enforcement of voting rights and presents the opportunity to vindicate the right of Black citizens to cast votes of the same weight as other electors and the ability of Black communities

---

[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

to exercise the political power secured to them by this Court's one-person, one-vote decisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

"One person, one vote" was a clarion call for Blacks whose individual votes and political power had been diluted by apportionment schemes that denied them an equally effective voice in the election of representatives. Yet Blacks' advances in political engagement following *Reynolds v. Sims* and other cases have been partially vitiated in many urban areas by districting decisions made on the basis of total population, rather than voting population, that fail to ensure that each citizen's vote be given as much weight as that of any other voter. Once again this Court's intervention is required to uphold the principle of equality in voting and thereby protect Black voting rights.

From the very beginning, the Court's one-person, one-vote cases have been concerned with enforcement of voting rights, particularly those that were denied to Black citizens. The Court was well aware that many jurisdictions abused the districting process to dilute Black votes and political power and thereby deny Black citizens full participation in representative government. As with earlier cases concerning more direct barriers to Black voting—such as race-based gerrymanders and whites-only primaries—the focus of these cases was always vindicating the right to vote, not a hypothetical right to equality of representation. Given this theoretical underpin-

ning of the one-person, one-vote principle, only measures of voting population, as opposed to total population including noncitizens, can provide a permissible basis for apportionment consistent with the principle's rationale and purposes.

That same view has, in fact, prevailed in districting litigation under Section 2 of the Voting Rights Act and should prevail here for the same reasons. As the Court has recognized, Section 2 builds on and furthers the same purposes of the one-person, one-vote principle—particularly the objective of ending vote dilution. The courts that have had occasion to consider the issue have unanimously concluded that voting population, not total population, is the appropriate metric for considering vote-dilution claims under Section 2, citing the law's focus on *vote* dilution, the practical consideration of providing remedies that are effectual in terms of elections, and the very nature of citizenship and voting rights. All apply with even greater force to the one-person, one-vote principle. Moreover, failure to harmonize districting principles under Section 2 and the Equal Protection Clause opens the door to abuses of the very kind that both were meant to prohibit.

Finally, as a factual matter, the use of raw population figures in apportionment dilutes the weight of Black votes and the political power of Black communities. Because Blacks are nearly always citizens, inclusion of non-citizens in the numbers used for apportionment tends to devalue Black votes. In major cities, the magnitude of this potential diminution in vote weight ranges from 10 percent in Chicago to 27

percent in Los Angeles. At that same time, use of total population also affects the drawing of district lines, depriving Black voters of majority-minority districts in some instances and the ability to elect their candidates of choice in coalition with other groups in others. Section 2 cases show that this is not a hypothetical impact but something that has actually happened in cities like Chicago and Dallas and likely many others. Perhaps surprisingly, the chief beneficiaries of this phenomenon have not been Latinos—whose political power would be little changed by use of voting population in apportionment—but white voters.

"[A] qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." *Hadley v. Junior College District*, 397 U.S. 50, 52 (1970). The Court should reaffirm that right and reverse the decision of the court below.

ARGUMENT

I. Equal Vote Weight Furthers the Principles and Purposes of One-Person, One-Vote

"[T]he Civil War Amendments were designed to protect the civil rights of Negroes," *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971), and the Court's one-person, one-vote decisions were made with expressly that purpose in mind. Drawing on earlier decisions rejecting race-based gerrymandering, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and whites-only primaries, *e.g.*, *Nixon v. Herndon*, 273 U.S. 536

(1927), the Court recognized as a general principle in *Reynolds v. Sims* that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964).

Reflecting its origins in cases concerning barriers to Black suffrage, that principle was premised on the idea of equal exercise of the right to vote—not, as would correspond with use of total population, a right to equality of representation. *Reynolds* identified its "objective" in precisely this way:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

377 U.S. at 560 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964)).

Reynolds also framed the specific issue before the Court in terms of the voting right and, therefore, vote weight: "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those

residing in the disfavored areas had not been effectively diluted." *Id.* at 562. *See also Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable."). And it connected that concept—vote weight—to the denial of rights based on race that the Court had rejected in its recent civil-rights case, explaining that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." *Reynolds*, 377 U.S. at 566. *See also Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.").

The Court was not, of course, blind to the reality that dilution was among the most potent of the "second generation" barriers to enforcement of Blacks' voting rights. The apportionment plan at issue in *Reynolds* was marked by "[s]ystematic and intentional dilution of Negro voting power by racial gerrymandering," including through violation of the one-person, one-vote principle. *Sims v. Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965). The state's apparent purpose, the district court observed on remand from this Court, was "turning Negro majorities into minorities" in the state legislature. *Id.* Implicit in *Reynolds*, and stated explicitly in later cases, the one-person, one-vote rule was aimed at ad-

dressing, in part, the unfortunate reality "that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices." *Shaw v. Reno*, 509 U.S. 630, 640 (1993) (citing *Allen*, 393 U.S. at 569).

In large measure, it succeeded. The "remarkable transformation in Southern electoral politics" of the decades following *Reynolds* was in large measure attributable to the "elimination of malapportioned legislatures and of at-large election systems...[,] in which litigation in the federal courts played the central role." Peyton McCrary, Bringing Equality to Power, 5 U. Pa. J. Const. L. 665, 666–67 (2003). *See also* Jesse Choper, Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, 83 Mich. L. Rev. 1, 93–94 (1984) (discussing empirical studies on the "impact of reapportionment" in the wake of *Reynolds*).

Considered in this context, *Reynolds* and its progeny fit comfortably in the Court's broader jurisprudence of the civil-rights era, enforcing the individual rights that had been too often denied to Black citizens. And that is, in fact, *Reynolds's* central concern: "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." 377 U.S. at 567. At the core of one-person, one-vote lies the principle of vote equality, not equality of representation.

II. Equal Vote Weight Should Prevail Here for the Same Reasons It Has Under Section 2

In the Voting Rights Act (VRA), "'Congress intended to adopt the concept of voting articulated in *Reynolds v. Sims*, 377 U.S. 533 (1964), and protect Negroes against a dilution of their voting power.'" *Perkins v. Matthews*, 400 U.S. 379, 390 (1971) (quoting *Fairley v. Patterson*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part)). Building on the one-person, one-vote principle of *Reynolds* and subsequent cases, *Perkins* found that this anti-dilution purpose required jurisdictions subject to preclearance under Section 5 of the VRA to seek Department of Justice or federal court approval as to a "revision of boundary lines," including annexation, because "it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* at 388 (quoting *Reynolds*, 377 U.S. at 555).

Section 2 of the VRA also embodies this anti-dilution purpose by prohibiting voting laws or practices that deny minority voters "an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quotation omitted). Section 2 provides a remedy for laws or practices that "cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," including those that "may operate to minimize

or cancel out the voting strength of racial minorities in the voting population." *Id.* at 47 (quotation marks and alterations omitted).

The courts that have had occasion to consider the issue have unanimously concluded that voting population, not total population, is the appropriate metric for considering vote-dilution claims under Section 2. In making that determination, courts have drawn on the vote-dilution concepts articulated in *Reynolds* and related equal-protection cases, and their reasoning demonstrates equally that voting population is the correct standard for apportionment under the Fourteenth Amendment.

A. Voting Rights Act Section 2 Embodies and Applies the Same Vote-Dilution Concerns Identified in *Reynolds*

The Court's Section 2 decisions and one-person, one-vote decisions are premised upon the same principle of combatting *vote* dilution. The "foundation" for the Section 2 concept of "minority vote dilution" is the "notion of individual vote dilution, first developed by the Supreme Court in *Reynolds v. Sims*...." *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 627 (5th Cir. 1990).[2] *See also Nipper v. Smith*, 39 F.3d 1494, 1510 & n.33 (11th Cir. 1994) (same). *Reynolds* warned of "legislative districting schemes which give the same number

---

[2] *Rev'd on other grounds, Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991).

of representatives to unequal numbers of constituents," with the result of "[o]verweighting and overvaluation" of some citizens' votes as compared to others, depending on "where they happen to reside." 377 U.S. at 563. Thus, "[t]wo, five, or 10" citizens in an overpopulated district "must vote before the effect of their voting is equivalent to that of their favored neighbor." *Id.* *See also Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?").

The Court's Section 2 precedents have applied this principle to "the manipulation of district lines" that acts to "dilute[] minority voting power." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). In particular, the Court has recognized that dilution can occur when district lines divide a minority group "among various districts so that it is a majority in none," thereby preventing the group "from electing its candidate of choice." *Id.* It can also occur where members of a minority group are "packed" into districts so that the group, though "a super-majority" in that district, "will be assured only" of candidates in that district, thereby diluting its overall voting strength. *Id.* at 153–4. *See also Gingles*, 478 U.S. at 46 n.11.

In these respects, one-person, one-vote and Section 2 both share the same concern and the same objective: ensuring that state apportionment plans do not dilute citizens' voting power and thereby compromise their "inalienable right to full and effective partici-

pation in the political processes of [their] State's legislative bodies." *Reynolds*, 377 U.S. at 565. *See also Perkins*, 400 U.S. at 390.

B. Courts in Section 2 Vote-Dilution Cases Have Unanimously Rejected Arguments To Use Population Weight Instead of Vote Weight

This concern about unwarranted vote dilution has led courts in Section 2 cases to conclude unanimously that equal vote weight, not equality of representation based on raw population, is the appropriate standard against which to judge districting decisions that are alleged to have an impermissible discriminatory effect on minority groups.

This focus on equal vote weight flows from the very injury for which Section 2 provides a remedy: vote dilution. The "manipulation of district lines" resulting in "diluting minority voting power," *Voinovich*, 507 U.S. at 153, is only a cognizable injury that can be remedied in a meaningful way if "a minority group [is] composed of a sufficient number of voters" either to "elect a representative" or to "have a meaningful potential to do so," *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997). *See also Gingles*, 478 U.S. at 50 n.17 ("Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice....").

As the Fifth Circuit correctly recognized, this requires a court to consider voting population. The

"*raison d'etre* of *Thornburg* and of amended § 2," it observed, is "preventing dilution of [minority] votes." *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (quotation marks omitted). Thus, because "only voting-age persons who are United States citizens can vote[,] [i]t would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in [citizen] voting age numbers, continued to be defeated at the polls." *Id.* (quotation marks omitted). Evaluating a claim of *vote* dilution, to state the obvious, requires an analysis of *voters* and *voting* population.

The other courts to consider this issue have applied the same reasoning to reach the same conclusion. *See Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989)[3] ("the purpose of [the] geographical compactness [test] is to first determine whether minorities are capable of commanding a majority vote in a single-member district"); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) ("We think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of the statute."); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372 (5th Cir. 1999) (holding that courts must consider citizen voting-age population in because that metric "is required by the plain language of Section 2"); *Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019, 1023

---

[3] *Abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990).

(5th Cir. 2009) (reaffirming that citizen voting age population is the appropriate metric because "only voting-age citizens can be 'voters' who 'could form a majority'" under the Court's Section 2 precedent) (quoting *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality opinion)); *Thompson v. Glades Cnty. Bd. of Cnty. Comm'rs*, 493 F.3d 1253, 1263 n.19 (11th Cir. 2007)[4] (recognizing the "crucial distinction between a district with a majority of *eligible* minority voters and a district that is only majority minority because non-citizens are included in the count of the minority population").

Indeed, this Court articulated the very same reasoning in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 429 (2006) (*LULAC*). In discussing the configuration of a potential majority-Latino district, the Court acknowledged that Latinos were "a bare majority of the voting-age population," but this was "only in a hollow sense" because "the relevant numbers must include citizenship." *Id.* The Court held that only a measure like citizen voting age population (CVAP) "fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates." *Id.*

In addition to flowing conceptually from the injury Section 2 addresses and from "the plain language of Section 2" itself, *Perez*, 165 F.3d at 372, the use of voting population also derives from the "very concept

---

[4] *Rehearing en banc granted, opinion vacated on other grounds*, 532 F.3d 1179 (2008).

of citizenship" in the United States, which would be "diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens." *Barnett*, 141 F.3d at 704. "The right to vote," after all, "is one of the badges of citizenship." *Id.*

For that reason, courts of appeals have rejected the notion of "virtual representation"—the assumption that parents vote for the interests of their children and that citizens vote for the interests of noncitizens of the same race—as the basis for using raw population in Section 2 cases. *Id.* Although the proposal to "give extra votes to families with more than the average number of children" or to "give extra voting power to a racial or ethnic group which happens to have a higher than average number of children"—or, "by the same token," a higher than average number of noncitizens—could "be defended with reference to the concept of virtual representation," the concept is "a bizarre suggestion in our political culture." *Id.* And "its bizarreness is a clue that the concept of virtual representation is unlikely to have been adopted by the Voting Rights Act." *Id.*

C. The Same Reasoning Even More Strongly Supports Use of the Equal Vote Weight Criterion in One-Person, One-Vote Cases

Both of the bases that courts have cited for using vote weight in Section 2 cases apply with even greater force with respect to the one-person, one-vote principle.

First, the equal-protection mandate of voter equality is unquestionably a prohibition against vote dilution. Prior to the enactment of Section 2, the Court in *Baker v. Carr*, 369 U.S. 186 (1962), ruled that claims "that the right to vote of certain citizens was effectively impaired since debated and diluted" are justiciable. *Reynolds*, 377 U.S. at 556. In *Reynolds*, the Court determined that such claims have constitutional merit because "[d]iluting the weight of votes because of place of residence impairs basic constitutional right under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." 377 U.S. at 566. This is the genesis of the concept vote dilution, *Clements*, 914 F.2d at 627, and "preventing dilution of...votes" through apportionment requires, in the equal-protection context as in the Section 2 context, consideration of those who "can vote." *Campos*, 113 F.3d at 548 (quotation marks omitted). Indeed, "[i]t would be"—and has, in some cases, been—"a Pyrrhic victory for a court to" order reapportionment of districts in which citizens' votes will continue to be diluted because of large inequalities in voting population by district. *Id.* (quotation marks omitted). The remedy is simply the disease in another form.

Second, the "very concept of citizenship," *Barnett*, 141 F.3d at 704, that has led courts to reject use of total-population figures in Section 2 cases is at the core of the one-person, one-vote principle. *Reynolds's* legal analysis begins by affirming "the right of all qualified citizens to vote," and draws from that the principle that the Constitution forbids "debasement

or dilution of the weight of a citizen's vote" just as it forbids "wholly prohibiting the free exercise of the franchise." 377 U.S. at 554–55. Underlying that principle is a particular view of the nature of democratic government, one premised on the rights and responsibilities of citizenship: "'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.'" *Id.* at 560 (quoting *Wesberry*, 376 U.S. at 17). The basis of one-person, one-vote is the notion that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies," and "citizens can achieve this participation only as qualified voters through the election of legislators to represent them." *Id.* at 565.

In other words, one-person, one-vote is a necessary incident of *citizen* control of government through the democratic process. Thus, the Court's observation in *Reynolds* that, "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567. No less than in Section 2 cases, preventing such dilution requires that courts in equal-protection cases enforce the equal-vote-weight criterion.

D. Inconsistent Standards Under Section 2 and the Equal Protection Clause Present the Opportunity for Race-Based Gerrymandering and Vote Dilution

Aside from establishing the proper approach for analyzing vote dilution, the Section 2 decisions mandating the use of voting population in drawing ma-

jority-minority districts present a practical problem: map-drawers typically use CVAP and total population numbers side-by-side in districting. CVAP is used for determining whether a majority of minority voters is or can be placed within a district, and total population is used for determining whether the district falls within an appropriate population deviation from the ideal.

That approach, at a minimum, requires additional race-conscious decision-making in drawing majority-minority districts and, at worst, creates opportunities for intentionally manipulating voting strength based on race. If a legislative body identifies a reasonably compact group of minority *voters* that is politically cohesive in an area with racial bloc voting, it is required to draw them into a district with more than 50 percent eligible voters of that race. *Bartlett*, 556 U.S. at 12–14 (plurality opinion); *LULAC*, 548 U.S. at 429–30. At the same time, however, the district must have roughly equal population compared with other districts in the jurisdiction to comply with the equal-protection clause, and the metric for judging equality will be total population. Thus, once a district is drawn to have 50 percent plus 1 minority eligible voters, the question becomes: who else should be drawn into the district to comply with one person, one vote? If nonvoters are not equally distributed in the area (which is the only scenario where the distinction between CVAP and total population makes a difference) then the map-drawer must decide whether to fill out a majority-minority district with a large number of eligible voters or

nonvoters. The answer to that question determines the relative voting strength of the minority voters in the district compared with voters (minority or otherwise) in surrounding districts.

The decision becomes even more complicated—and more fraught with racial considerations—if the majority-minority district is contiguous with other majority-minority districts, as is often the case. Suppose that one portion of a city has a significant population of minorities, including a large segment of Latino residents (citizen and noncitizen) and a large segment of Black residents. If there is racial bloc voting, the legislature will likely be required under Section 2 to draw both a majority-Black and a majority-Latino district, assuming it can feasibly do so consistent with its traditional redistricting principles. Each majority-minority district will be comprised of at least 50 percent Latino and Black voters, respectively, which will allow these groups the *opportunity* to elect their preferred candidates.

The districts, however, will also include other residents to comply with the equal-protection clause, and (again, assuming consistency with traditional districting principles) the government will have discretion in deciding who those residents will be, *see Bush v. Vera*, 517 U.S. 952, 977–78, 984 (1996) (principal opinion), and will be faced with choosing the relative weight of Black and Latino votes by deciding where to place the communities with high numbers of nonvoters. At best, this confronts the legislature with yet another race-based choice in a process where race should not be "predominant." *Miller*

v. Johnson, 515 U.S. 900, 916 (1995). At worst, this allows the legislature to intentionally favor one racial group over another. And given that Blacks and Latinos disproportionately reside in proximity to one another in disadvantaged parts of urban areas, this scenario is not at all unusual.[5]

By contrast, a legislature that uses CVAP both in drawing Section 2 districts *and* in apportioning population does not get to decide what the relative voting strength of racial minorities in Section 2 districts will be. Instead, the legislature in that instance is required to fill out each district with eligible voters, and the relative weight of those eligible voters' votes will be secured. This limits the potential for manipulation of vote weight based on race and the potential for invidious discrimination.

III. The Use of Raw Population in Apportionment Dilutes Black Votes and Black Voting Power

States depart from the equal-protection mandate and frustrate the political power of minority communities when they apportion districts to comport with a total-population measure of the ideal equal population. This metric causes vote dilution when "eligible voters are unevenly distributed" across a jurisdiction and voters in districts with dispropor-

---

[5] The discussion of the layout of Dallas, Texas, *infra* § III.B, indicates that Blacks and Latinos reside in contiguous and overlapping communities in the southern portions of that city. Many cities have similar layouts.

tionate numbers of noncitizens "leverage the votes of the smaller number of eligible voters" to exercise disproportionate electoral power. *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000). Because the uneven distribution of eligible voters often correlates with geographically compact communities of noncitizens, which in turn correlates with race, the misuse of total population as the basis for district apportionment almost inevitably leads to racial inequality in voting power.

As with most other deviations from basic principles of equality in voting, the result tends to be the dilution of Black votes and political power. That is because, where noncitizens comprise a meaningful proportion of the population, Blacks nearly always comprise a higher percentage of the voting population than of the total population.

Thus, where states use total population, rather than CVAP or another measure that generally reflects voter eligibility, in apportioning their districts, Black voters are disadvantaged, in two distinct ways. First, and most obviously, each individual Black voter wields less voting power when districts are drawn based on total-population figures rather than voting-population figures. Second, Black communities, which are often cognizable "communities of interest" drawn into districts either under Voting Rights Act Section 2 or simply under traditional districting principles, are diminished in their ability to elect their preferred candidates of choice and are commensurately underrepresented in legislative bodies compared to their actual voting strength.

These impacts are not hypothetical. As a factual matter, Black citizens today are suffering both kinds of injuries in many major urban areas due to states' misuse of total-population metrics in apportionment.

A. The Use of Total Population in Apportionment Dilutes Black Votes

The dilution of individual Black votes flows directly from differences between Blacks' proportion of the voting population and of the total population in many urban areas. These differences range from modest to stark, but in each case the use of total population in drawing districts meaningfully dilutes the value of individual Black votes, as Black voters are more likely to reside in districts containing fewer noncitizens and therefore more voters.

- In Chicago, the population of voting-age Black citizens is 628,015, or roughly 35.3 percent of the total voting population. The total Black population is estimated to be 862,567, or roughly 31.9 percent of the total population. Accordingly, apportionment according to total population rather than CVAP could potentially diminish the value of a Black citizen's vote by nearly 10 percent.[6]

---

[6] The total-population data for each city described here is taken from the U.S. Census Bureau's American Community Survey data. United States Census Bureau, American Community Survey, 5-Year Data Profiles, *available at* http://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/ (last visited Aug. 6, 2015). The figures cited

- In New York City, the population of voting-age Black citizens is 1,224,990, or roughly 23.8 percent of the total voting population. The total Black population is 1,677,183, or roughly 22.7 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 5 percent.
- In Los Angeles, the population of voting-age Black citizens is 266,275, or roughly 12.4 percent of the total voting population. The total Black population is 346,201, or roughly 9.01 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by over 27 percent.
- In Miami, the population of voting-age Black citizens is 41,480, or roughly 19.7 percent of the total voting population. Black total population is 69,102, or roughly 17.0 percent of the total

---

here for total Black population corresponds to the category "Black or African American alone," which excludes individuals who identify as being Black and "Hispanic or Latino" on the Census form. The citizen voting-age population data for each city described here is taken from the U.S. Census Bureau's Redistricting dataset. United States Census Bureau, Redistricting Data, Voting Age Population by Citizenship and Race (CVAP), *available at* https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Aug. 6, 2015). The figures cited here for total Black population correspond to the category "Black or African American alone."

population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 14 percent.

- In Houston, the population of voting-age Black citizens is 355,225, or roughly 29.8 percent of the total voting population. The Black total population is 491,973, or roughly 23.01 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 23 percent.
- In Dallas, the population of voting-age Black citizens is 213,690, or roughly 30.9 percent of the total voting population. The total Black population is 296,480, or roughly 24.3 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by over 21 percent.
- In Atlanta, the population of voting-age Black citizens is 175,705, or roughly 53.5 percent of the total voting population. The Black total population is 229,023, or roughly 52.9 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by over one percent.

In each of these cities, the use of total population, rather than a measure of voting population, in apportionment diminishes the weight of individual

Black votes, often by substantial amounts. And while these examples are representative large U.S. cities, the same phenomenon is evident in smaller localities across the United States where substantial numbers of noncitizens reside. Just one example is San Bernardino, California, where the population of voting-age Black citizens is 20,105, or roughly 17.1 percent of the voting population. The total Black population is 27,984, or roughly 13.2 percent of the total population. Accordingly, apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 23 percent.

B. The Use of Total Population in Apportionment Dilutes Black Communities' Voting Power

The diminishment of weight accorded to Black votes when states use total population, rather than CVAP, in reapportionment is clear enough from the numbers alone. The negative impact on the ability of Black communities to elect their candidates of choice in actual districts is more difficult to discern, given the political and geographic factors involved in redistricting. But the evidence is clear that there is such an impact and that, in some instances, it is substantial.

The best evidence comes from Section 2 litigation. For example, *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998), considered a Section 2 challenge to Chicago's ward map brought by Black and Latino voters who alleged that their communities were un-

derrepresented in the ward system. Using the city's total population percentages, the district court found that Black and Latino voters were both proportionally represented according to their respective population percentages: they comprised 39 and 20 percent of the population, respectively, and comprised meaningful majorities in, respectively, 38 and 14 percent of the wards. *Id.* at 703; *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1450–51 (N.D. Ill. 1997). On that basis, the district court rejected both groups' Section 2 claims. *Barnett*, 969 F. Supp. at 1458–59.

The appeals court affirmed the decision as to the Latino plaintiffs but reversed as to the Black plaintiffs. Relying on CVAP numbers, it found large deviations from equality in representation in Chicago's ward system: "Blacks are underrepresented, whites and Latinos overrepresented." *Barnett*, 141 F.3d at 705. The difference was "not trivial," and the Black plaintiffs were able to show that an alternative map would result in an additional majority-Black ward—one that the district court had discounted due to its use of total population. *Id.* at 704–05. On remand, the district court concluded that the maps presented by the Black plaintiffs "better balance the relevant factors than does the existing map" and ordered the city council to redraw the wards accordingly. *Barnett v. City of Chicago*, 17 F. Supp. 2d 753, 759 (N.D. Ill. 1998). The result of apportionment according to CVAP, rather than total population, was the gain of an additional majority-Black district.

That result is as likely to occur even without the conscious effort to draw majority-minority districts

because, ultimately, numbers drive the apportionment process. One example of a locality where equalized voting population may improve the ability of Blacks to elect their preferred candidates is the city of Dallas, Texas. As noted above, the best available estimates indicate that Blacks comprise 24.3 percent of Dallas's total population and 30.9 percent of the eligible voters. Latinos comprise 41.9 percent of Dallas's total population, but only 21.5 percent of the eligible voters. Whites comprise 29.3 percent total population and 43.3 percent of the voting-age population.[7]

The city is currently apportioned by total population, not CVAP.[8] The most recent redistricting plan, approved in 2011, divides the city into 14 single-member city-council districts. These districts were drawn with a total population deviation of approximately 10 percent (plus or minus 5 percent from the ideal). Under the total-population metric, 4 districts (Districts 1, 2, 5, and 6) have substantial Latino to-

---

[7] These numbers come from the sources cited in n.6 *supra*.

[8] The information in this section concerning the 2011 Dallas City Council map is publicly available from the 2011 Adopted Districting Plan report of the City of Dallas Redistricting Commission, *available at* http://dallascityhall.com/departments/intergovernmentalservices/redistrictingcommission/DCH%20Documents/Submission_adopted_packet100511.pdf (last visited Aug. 6, 2015). There are, of course, minor discrepancies between the data reflected in this document and that from the sources in n.6 *supra*. The numbers throughout this section for total population refer to the Census numbers referenced above.

tal-population majorities, ranging from 62.59 to 79.17 percent. *Id.* The voting-age population of each is several percentage points lower, but remains well above 50 percent, ranging from 56.10 to 74.19 percent.[9] Three districts (Districts 4, 7, and 8) have majority-Black voting-age population, ranging from 50.76 to 60.57 percent. In addition, Districts 3 and 10 are "minority coalition" districts where neither Latinos nor Blacks comprise a majority, but together outnumber white voters. The remaining five districts are majority white. The majority-Black and majority-Latino districts, along with District 3, cover the south side of Dallas and are all contiguous with one other, indicating that the minority population is concentrated in that part of the city. District 10, the other coalition district, is on the northeast side of Dallas.

That configuration is, as one would expect, roughly consistent with the total-population figures noted above. Latinos comprise 42 percent of the total population and have majorities in 4 of the 14 of the districts (and significant representation in the two "coalition" districts), while Blacks comprise 25 percent of the total population and have majorities in 3 of the 14 districts (and significant representation the two "coalition" districts). But this configuration also reflects huge disparities among voter numbers. Latinos

---

[9] District-by-district CVAP appears not to have been provided in the city's redistricting materials. Voting-age population as reflected in the Dallas Redistricting Commission documents includes noncitizens.

comprise only 22 percent of potential voters, yet have majorities in nearly 30 percent of the districts; Blacks comprise 31 percent of potential voters, yet have majorities in only 21 percent of the districts. In this respect, Black communities' political power in Dallas is undermined by the use of total-population figures in districting.

The current makeup of the city council not only confirms this discrepancy, but also suggests that *white* voters are the beneficiaries of the inequality in voting power. Currently, white council members represent all majority-white districts and one of the minority coalition districts.[10] All three Black districts are represented by Black councilmembers, which is notable given that Black voters comprise only a bare majority of District 7 voters, and a Black councilmember represents the other coalition district (District 3). However, only two of four majority-Latino districts (Districts 2 and 6) are represented by Latino councilmembers. White councilmembers represent both of the remaining majority-Latino districts (Districts 1 and 5), even though Blacks have meaningful voting-age population in each, particularly in District 5, and appear to have Black voting-age population to spare in two contiguous majority-Black districts (Districts 4 and 8) and in a contiguous majority-Latino district (District 6). Thus, with

---

[10] *See* City of Dallas, City Council, *available at* http://dallascityhall.com/government/Pages/city-council.aspx (last visited Aug. 6, 2015).

the Black population divided in this manner and the Latino population lacking in voting strength to elect Latino candidates, whites hold 57 percent of Dallas's City Council seats, despite comprising less than 30 percent of Dallas's total population and 43 percent of its voter population.

Significantly, the race of candidates and elected officials matters in Dallas because there is evidence of racially polarized voting in the region. *Barnett*, 141 F.3d at 702. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 52 (1986). That, of course, would be typical of any Southern city with a history of racial discrimination and racial tension.[11] Multiple court cases have confirmed that it is the case in Dallas specifically, *see, e.g.*, *Bush v. Vera*, 517 U.S. 952, 995 (1996) (O'Connor, J., concurring) ("Dallas County has a history of racially polarized voting."), including in Dallas City Council elections, *Williams v. City of Dallas*, 734 F. Supp. 1317, 1388 (N.D. Tex. 1990). *See generally Veasey v. Abbott*, No. 14-41127 (5th Cir. filed Aug. 5, 2015), at 30 (noting Texas's concession that "racially polarized voting exists in 252 of its 254 counties").

And, in fact, there is statistical evidence, current as of the 2011 redistricting of Dallas, of racially po-

---

[11] *See* Michael Li, Two Texas Cases Test the Boundaries of Redistricting Law, Brennan Center for Justice (Feb. 17, 2015), *available at* https://www.brennancenter.org/blog/two-texas-cases-test-boundaries-redistricting-law (last visited Aug. 6, 2015) ("Racially polarized voting exists in Dallas County—as it does in most of Texas and the South.").

larized in the Dallas region. In ongoing Section 2 litigation concerning Texas's congressional and legislative districts, the Texas Latino Redistricting Task Force submitted the expert testimony of Duke University professor Richard Engstrom, who analyzed elections in the Dallas region through ecological inference analysis developed by Gary King.[12] Dr. Engstrom concluded that there is "racially polarized voting in Dallas County" as to Blacks, whites, and Latinos. In general elections, "Latinos were very cohesive in their preferences for Latino candidates with the Democratic nomination, and that preference was shared by African Americans," but not by white voters. More importantly, in *primaries*—the relevant elections due to strong party preference—"Latinos are likewise very cohesive in their preferences for Latino candidates," but "these preferences are not usually shared by the non-Latino voters participating in them." Significantly, Blacks "were revealed to be the least likely group to support Latino candidates in Democratic primaries." It is therefore highly improbable that the preferred candidates of choice for Latino voters in Dallas city council elections are white or, for that matter, Black.

All of this indicates that the equalization of total population, but not voting population, aids the ability of white voters in electing their preferred candidates of choice, detracts from the ability of Blacks to

---

[12] *Perez v. State of Texas*, 5:11-cv-00360-OLG-JES-XR, ECF No. 307-1, at 1, 14–15 (W.D. Tex. filed Sept. 13, 2011).

elect their preferred candidates of choice, and makes little or no difference for Latinos. Latinos have managed to elect their candidates of choice in only two of four districts, Districts 2 and 6, and in *neither* coalition district, even with districts apportioned by total population. Notably, because Districts 2 and 6 are on the lower end of Latino voting-age population in majority-Latino districts (56 and 65 percent, respectively), it seems probable that noncitizen Latinos are not evenly distributed through the majority-Latino districts, but rather are concentrated in Districts 1, 3, and 5, which are not represented by Latinos. There is very little reason to believe that reapportionment to achieve voter equality would result in *fewer* districts represented by Latinos.

Blacks, meanwhile, are underrepresented as compared with their share of Dallas's citizen voting-age population. This is not for lack of electoral cohesiveness: the Black community appears to have succeeded in electing its preferred candidates in the three majority-Black districts. Blacks also appear to have elected their candidate of choice in District 3, which would almost certainly be solidified as a majority-Black district under equal-vote apportionment. But they currently have little hope of electing their preferred candidates in the other coalition district, District 10, where white voting-age population is notably higher than Black voting-age population. Expanding that district could draw in additional Black population in contiguous Districts 9, 11, or 13, to give the Black community greater numbers or even a majority in that district. And the relatively signifi-

cant percentage of Black voters in majority-Latino Districts 1 and 5 (compared to the percentage of white voters in those districts), and proximity of those districts to other districts with additional Black voting-age population, suggest that redistricting according to CVAP would result in additional Black representation—almost certainly one, and perhaps two, additional secure majority-Black districts and multiple additional districts where Black candidates of choice would be competitive or successful.

Besides demonstrating the likelihood that using CVAP would likely improve the ability of Black communities to elect their preferred candidates of choice, the Dallas example also shows that the "losers" in an equal-voter regime may not be Latino voters. The beneficiaries of a total-population apportionment system are residents of low-voter districts who are able to elect their preferred candidates of choice more easily than similarly situated individuals and communities in high-voter districts. Where a district has a low number of eligible voters because of a disproportionate number of noncitizen residents, the citizen residents may or may not be of the same race as the noncitizens and, even if they are of the same race, may or may not "have a strong community of interest" with the noncitizens. *Barnett*, 141 F.3d at 704. *See also Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same

political interests, and will prefer the same candidates at the polls.'") (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

It therefore can neither be assumed that districts with large numbers of noncitizen Latinos will also include large numbers of voting Latinos nor that voting Latinos will represent the interests of noncitizens. Again, in Dallas, the voters in districts that appear to have large percentages of noncitizen Latinos appear to have had little interest in electing Latino-preferred candidates, and there is no reason to believe that will not typically be the case.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Counsel for the Amicus Curiae

AUGUST 2015